United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1178

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In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

vs.

FRANK CLARK, III,

Appellant.

Appeal from Judgment and Order Dated April 3, 1975 in the United States District Court for the Southern District of New York — Sat Below: Robert L. Carter, U.S.D.C.

BRIEF FOR APPELLANT

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2 Wright's Federal Practice and Procedure (Criminal) p. 268

3 Wright's Federal Practice and Procedure (Criminal) p. 133

STATEMENT

Defendant FRANK CLARK, III appeals to this Court from the judgment of the United States District Court for the Southern District of New York, rendered the 3rd day of April, 1975, convicting him of unlawfully, willfully and knowingly transporting in interstate commerce a diamond weighing approximately 8.04 carats, from Vermont to New York, knowing the same to have been stolen, converted and taken by fraud, in violation of Section 2314 of Title 18, United States Code, after trial before Carter, J., and a jury. The defendant received a sentence of imprisonment for a period of six months with execution of prison sentence suspended, and a fine of $7,500. which is to be paid or the defendant is to stand committed.

INTRODUCTORY

Defendant was accused of transporting a stolen diamond ring valued at more than $5,000 in interstate commerce from Vermont to New York (A 4). After a three day trial, on February 20, 1975, a verdict of guilty was rendered by a jury (512). Motions by defendant to suppress evidence (A 12), to dismiss the indictment (A 9) and for a new trial (A 19) were denied.

In May, 1972, defendant purchased the diamond ring from William Turner, a friend and former client of defendant, who is an attorney admitted to the Florida Bar, for $15,000 cash and the forgiveness of two debts totalling $5,000 (250).

On January 10, 1974, defendant took the ring to L. Bergman, Inc., a diamond merchant in Rockefeller Center, New York, for appraisal and possible sale (265). On January 11, 1974, defendant was visited by FBI agents who questioned him in connection with the ring which was missing from the Nieman-Marcus store in Dallas, Texas (A 13). Defendant on the same day demanded the return of the ring from Bergman who refused and admitted that a search warrant had not been served (268). Although defendant was not advised of his constitutional rights, the aforesaid interview and seizure of the ring were used to bring about an indictment (A 12).

Five grounds were employed as the basis of defendant's motion for a new trial which was denied (A19-A21).

EVIDENCE

What was actually proven was that defendant was innocent of the charges against him.

1. Defendant paid a substantial price for the ring (337).

2. Defendant kept the ring for twenty (20) months (263) and openly transported and showed the ring to top quality jewelers and jewelry stores in Nassau; Winter Park, Florida; Atlanta; Philadelphia; New York; Boston; Montreal and Palm Springs, California, for purposes of appraisal and to obtain insurance for the ring (251, 252, 254, 256, 257, 322, 328, 329).

3. Reasons the ring were offered for sale were (263):

a) No insurance because of high cost and restrictions.

b) Sharp rise in value over twenty (20) month period of ownership.

c) Fear for wife's personal safety.

4. Defendant gave witness for the prosecution Duffield unlimited permission to show the ring. (265).

5. Receipt for ring offered in evidence by prosecution is evidence of the candor, integrity, and fair dealing of defendant in attempting to sell the ring (265).

6. Total cooperation by defendant with the FBI in the investigation as proof that defendant had nothing adverse to conceal (267).

The evidence proved a reasonable doubt of guilt if not the total innocence of defendant (A19, A21). The subsequent charge to the jury after they were deadlocked tended only to confuse the jury and to incriminate the defendant (500-504; 506-512).

POINT ONE

AN ACQUITTAL BELOW WAS MANDATORY BECAUSE GOVERNMENT FAILED TO PROVE EVERY ELEMENT OF THE CRIME CHARGED.

The defendant was charged with violating Title 18, United States Code, Section 2314, insofar as the section refers to the transportation of stolen goods (A4).

The pertinent part of the statute reads as follows:

> "Whoever transports in interstate... commerce... any goods... of the value of $5,000.00 or more, knowing the same to have been stolen, converted, or taken by fraud"

There are four elements of this offense, namely:

(1) The goods were, in fact, stolen, converted, or taken by fraud.

(2) Defendant knew goods were stolen, etc.

(3) Value of goods had to be $5,000.00 or more.

(4) Goods were transported in interstate commerce.

The government must prove beyond reasonable doubt each and every element of the crime charged, and every fact or circumstance necessary for conviction (GRUNEWALD v. UNITED STATES, 353 U.S. 391; CHRISTOFFEL v. UNITED STATES, 338 U.S. 84; DAVIS v. UNITED STATES, 160 U.S. 469). The burden of proof as to the guilt of the accused is always

on the Government. The burden remains on the Government until the end of the trial (LELAND v. STATE OF OREGON, 343 U.S. 790). The burden of proof never shifts to the defendant to prove his innocence. Once the prosecution has presented a prima facie case, the defendant's case may offer evidence in rebuttal, or he may offer no proof and rest on the presumption of innocence (EZZARD v. UNITED STATES, 7 F2 808).

A crime is, such as here, ordinarily composed of more than one element. To convict the defendant of a specific crime, the prosecutor must establish every element which constitutes a link in the chain that comprises the crime. His failure to do so, such as here, makes an acquittal mandatory.

Furthermore, the gist of the offense described by the statute in question is manifestly the transportation of the stolen or converted property in interstate commerce. The statute does not purport to punish for larceny but for the transportation in interstate commerce of stolen property. Judge Gardner held:

> "To constitute the offense the property transported in interstate commerce must have been stolen property and it must have been of that character before it was transported in interstate commerce. It is therefore of the utmost importance to determine whether this property had been stolen or converted before it was transported in interstate commerce," citing ACKERSON v. UNITED STATES, 185 F2 485 and UNITED STATES v. MERCER, 135 F. Supp. 288.

In the ACKERSON case, supra, defendant argued on appeal that the evidence was insufficient to prove the offense charged because the proof failed to show that the property transported was stolen property. The statute there,

18 U.S.C.A. 2312, deals with transportation of stolen vehicles, but the statute is very similar to the statute here, namely, 18 U.S.C.A. 2314, dealing with transportation of stolen goods. The Court in ACKERSON said:

> "The statute does not purport to punish for larceny but for the transportation in interstate commerce of stolen property. As the statute does not define larceny, it must be assumed that Congress had in mind larceny as defined by the common law... At common law larceny may be said to consist in 'the felonious taking by trespass and carrying away by any person of the goods or things personal of another from any place, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to commit it to the taker's own use", citing 32 Am. Juris., Sec. 2, p. 893.

There has been no proof of common law larceny in this case. In the ACKERSON case, the Court labored with the distinction between obtaining property by false pretenses and by means of larceny. Only the latter would meet the requirements of the statute and sustain a conviction under 18 U.S.C.A. 2312. Similarly if the car, or the ring in this case, had been lost instead of stolen, the requirements of the statute would not be met.

In UNITED STATES v. MERCER, supra, the Court, in regard to the necessity of proving that the property in question was stolen, converted or taken by fraud, stated:

> "The Government does not seriously dispute the requirement that the money must have been taken by fraud at the time of its transportation interstate...".

The Court of Appeals in LOMAN, supra, reversed the conviction on the grounds that the Government failed to prove that the property in question was stolen before it was transported in interstate commerce.

Defendant, indicative of his cooperation with the Government, stipulated when this case was pre-trialed, as to one of the elements of the crime charged, namely that he did transport the diamond from Vermont to New York on or about January 9, 1974 (5, 43). At the commencement of the trial, evidencing his continuing cooperation and belief in his innocence, he further stipulated as to a second element of the offense charged, namely, that the diamond in question is valued at more than $5,000.00 (5, 6, 43). Therefore, defendant stipulated to all the elements he could consistent with his position of innocence, leaving only two elements to be tried, namely, whether in fact the ring was stolen and whether defendant knew it was stolen (6).

Defendant made a written motion, prior to trial, to dismiss the indictment on the grounds it failed to allege one of the essential elements of the crime charged, namely, that the ring was in fact stolen (2). The Court denied the motion at the commencement of the trial (2).

The prosecutor, in his opening statement, read the indictment to the jury which did not contain the essential element of the ring having been in fact stolen (42). The seriousness of this omission of the element in the indictment was increased by the prosecutor's statement immediately following his reading of the indictment, namely:

> "Those are the charges and you should keep those charges in mind, because that is ultimately all that you will have to be concerned with during the course of the trial" (emphasis added).

Therefore not only was the required element missing from the indictment but the prosecutor told the jury that everything they need be con-

cerned with was contained in the indictment which was not correct.

In his opening to the jury, the prosecutor referred to the four elements and stated that two elements had been agreed to, leaving "a relatively simple case, with two issues in it: Was the diamond stolen? And did Mr. Clark know that the diamond was stolen when he transported it from Vermont to New York?" (43)

The prosecutor then summarized for the jury in his opening what he expected the evidence would show. He said the Government would call Stanley Doppelt, a diamond cutter, who would testify that he cut a diamond ring in November, 1971, that the ring had some imperfections and was not round, and that he sent the ring to Neiman-Marcus in Dallas. (43, 44) He said they would prove the wholesale value of the ring at that time was $39,000 and the retail value was §62,500.00 (44).

The prosecutor said the evidence would show that Neiman-Marcus received the ring and then he stressed the abundance of security surrounding the ring as follows:

> "they followed their normal careful security with respect to guarding this valuable piece of merchandise, that they kept it in safes, that it was never unlocked, never kept in an unlocked condition that they knew of, and that when it was on display there were always attendants surrounding it" (44).

With such extreme caution, how could the ring have been lost, let alone stolen?

He said that Stephen Magner, a jewelry salesman at Nieman-Marcus, would testify that he remembered showing the diamond to a custo-

mer on May 25, 1972 (45) and so the ring was still at the store on that date.

Then the prosecutor dramatized the coincidence of defendant, his wife and another couple coming from Vermont and going to L. Bergman & Sons to sell the ring (45). The proprietor, Gordon Duffield, allegedly told them that it was a valuable diamond and he would get another appraisal (45). Then, after further dramatization, he said that Duffield took the diamond to Doppelt, the diamond cutter, for another appraisal, and Doppelt recognized the ring (45). Then the prosecutor stated in his opening that the FBI was called into the case. (46)

He then told the jury that the next day in January, 1974, two FBI agents interviewed defendant as to how, why and where he acquired the ring which "they now believed to be stolen". (46). He didn't tell the jury of any evidence they intended to introduce which caused the FBI to believe the ring was stolen.

The prosecutor said that the defendant told the FBI that he got the ring in late spring, 1972, from William Turner, a gambler in Florida whom he knew (46). He told the jury that defendant told the FBI he didn't know where Turner got the ring but he suspected he won it gambling (46). This would be no proof that the ring was stolen, nor that defendant knew it was stolen.

He said that defendant told the FBI he paid $20,000 for the ring and that he didn't see any title papers for the ring (46). How many persons, unsophisticated in the jewelry line, could distinguish between a ring worth

$20,000.00 and one worth $39,000.00, especially in this day and age of artificial stones? On the other hand, cannot one rely to some extent at least on the word of a person you've known for a good number of years? The fact that that person may be a gambler doesn't mean necessarily that one cannot rely on what he says.

Furthermore, the prosecutor said nothing about evidence proving that, under Florida law where the ring was purchased, a bill of sale was required.

The prosecutor told the jury in an inflammatory way that the evidence would show that defendant gave inconsistent versions of where he got the ring (47). He didn't explain for what purpose such purported evidence would be offered, nor did he state for what purpose he referred to a divorce proceeding defendant was involved in in September, 1972. He said the defendant told the FBI he got the ring for his fiance as an engagement present (47). The use of this purported evidence to prove either of the two remaining elements is unlikely.

He then detailed for the jury the evidence the Government expected to produce showing inconsistent statements by the defendant regarding the ring (47). He said the defendant on his matrimonial deposition testified that he hadn't given any ring to his fiance, that he had virtually no bank accounts, and that his fiance purchased the ring and that he didn't know how much the ring cost (47). Assuming the accuracy of these inconsistent statements, they still don't prove that the ring was stolen, nor that the defendant knew it

was stolen.

The prosecutor outlined for the jury two additional inconsistent statements allegedly made by defendant, one to Seymour Shultz, a jeweler in Vermont, and another to Tom Sander, a newspaper reporter (48).

The Government called as its first witness Stephen Magner, a jewelry salesman in Nieman-Marcus in Dallas (58). He testified to the manner in which his store records valuables when they are received (59). He later identified six documents used by the store in receiving such valuables (62, 63) and the same were allowed in evidence over objection (64). Exhibit 1 is the consignement agreement between Doppelt and Nieman-Marcus for the ring in question on November 9, 1971(65, 71). Exhibit 5 was a document returning the ring to Doppelt on December 28, 1971 (67). Exhibit 4 is a consignment agreement whereby Doppelt returns the ring to Nieman-Marcus on January 3, 1972 (68). Exhibit 3 is a sheet by which Nieman-Marcus transferred the ring from its Dallas store to its store in Bal Harbour on March 29, 1972 (68, 69). Exhibit 2 is a sheet by which the ring was returned by the Bal Harbour store to the Dallas store on May 8, 1972. Exhibit 6 is a Nieman-Marcus stock sheet containing a history of the ring at the store (69-71).

Magner showed the ring to a customer on May 25, 1972 in a private office at the store. He didn't know whether he took the diamond with him when he left the office or not (72). He never saw the diamond again. (73).

Magner then testified as to the security measures employed by his store for precious jewelry (73-80). He said inventories of consigned goods

were taken twice a year in January and July (80). He identified Exhibits 8 and 9 as inventory sheets for his store for July 1972 and January 1972 respectively (80-82). Although there was no testimony Magner had any personal knowledge as to the preparation of these two exhibits, he testified he did participate in taking inventories and these sheets were maintained in the regular course of business in the store. (80, 81). There is serious question as to whether a proper foundation was laid for the admission of these last two exhibits into evidence. Exhibit 9, the January, 1972 inventory included the ring in question (82, 83). Exhibit 8, the July, 1972 inventory, had a notation "MISSING" next to the ring in question (83).

Magner then testified what internal steps were taken by the store after the inventory taken in July, 1972 first showed the ring in question to be missing (83, 84). He said, "after searching high and low, we couldn't find it" (84). He said, "Everyone in Premium Jewelry was looking for it, and also the security lady that stayed there -- everyone was asked if they had seen it or remembered dealing with it" (85).

On cross examination Magner maintained that the ring was "very salable" (85) and yet he admitted he never received an offer even for an amount less than the stated price (86).

Magner said that the store didn't change their security measures after this ring was discovered as missing (86). In the summer of 1972 the store had probably more than a thousand pieces of jewelry in that department (86, 87).

Magner said that he didn't report this ring as missing to the Dallas Police Department (87) and he didn't know anyone else who did (88). He didn't report the ring to the County Authorities in Dallas and he didn't know if anyone else did (88). He didn't report it to the FBI. (88).

Magner did not answer whether he knew or didn't know that the FBI report contained a statement that the store first advised the FBI of the missing ring in January, 1973. (89).

Magner testified on re-cross that he didn't believe he saw the defendant before the day he testified at the trial (91). He testified he also didn't believe that he ever saw William Ruben Turner (91).

Thus, the only thing proven by Magner's testimony was the history of the ring at the store; that it was discovered as missing when a store inventory was taken; that they looked for it at the store and never found it; and that they never reported it to his knowledge to any law enforcement authority. There was no evidence that defendant knew the ring was stolen.

The Government called as its second witness a jeweler from Vermont, Seymour Shultz (92). He said he met defendant on August 20, 1973 (93). He said defendant and his wife came to his store for a protective type jacket for an eight carat ring (93). Shultz made up a jacket but he did not want the ring left in his small store because of its value (95, 96). Defendant told him he bought the ring from a De Beers salesman six or seven years ago (99, 100). The witness knew De Beers didn't deal in polished stones (100). He gave defendant an appraisal value of $50,000 (100). He said defendant didn't show

him any title paper (100).

On cross examination Shultz admitted he didn't have too good a memory (103). In fact he testified he was known to have a bad memory (104). He said to the best of his knowledge defendant used his right name (107). He also admitted that defendant must have voluntarily given the FBI his name (108). There were no erasures from the ring mounting (109). Prices of diamonds were fluctuating fast at that time (112). Defendant wasn't interested in selling the diamond at that time (112, 113).

The purpose of Shultz's testimony is not clear. Certainly it didn't prove the ring was in fact stolen or that defendant knew it was stolen. This would have been the only purpose for the testimony. However, Shultz testified to having one of the older and nicer jewelry shops in Vermont (106, 107). If the ring had been stolen or had defendant known it to be stolen, it is unlikely that he would have dealt with it as openly as he did with Shultz, Shultz being the caliber of jeweler he was in Vermont. Also, had defendant known this he never would have given the FBI Shultz's name as someone to speak to regarding the ring.

The Government called as its third witness a jeweler from Boston named Goodman (114). He appraised a ring for the defendant in the fall of 1973 (115) for $50,000 (116). The defendant was surprised. He didn't realize that it was worth this kind of money. He thought it was worth a good deal less (116). Goodman said the ring was worth $50,000 when he appraised it in the fall of 1973, and $75,000 when he talked to the FBI (116, 120). The market

dropped again at the time of trial on February 18, 1975 (120). This is a substantial fluctuation in a very few months.

This evidence didn't prove the ring to be stolen nor did it prove that the defendant knew it to be stolen. In fact, it tends to prove that he didn't know either point because if he did, he would not have taken it to a jeweler of the caliber of Goodman and he wouldn't have dealt with it as openly as he did. Also very significant is the fact that the value of the ring fluctuated $25,000 in six months and that the defendant was surprised at the high appraisal.

The Government called as its fourth witness, Gordon Duffield of L. Bergman, Inc. (121). He met defendant on January 10, 1974 (121). Defendant came with his wife and another couple named Koelsch, to sell an eight carat ring (122). Defendant's wife told him she liked the ring but it was too big and she was afraid she'd get robbed of the stone (122, 127). They wanted $75,000 (122). They didn't say where they got that figure (122, 123). Duffield's associate suggested taking the stone out of the mounting and sending the stone over to the Gemological Institute of America which Duffield said was "sort of the bible for the jewelry industry" (123) and the defendant agreed and Duffield signed a receipt for the stone for $75,000 (123, Exhibit 13). It was too late to get the stone over to the Gem Institute that day (125) so Duffield and his partner looked at the stone and saw two little marks (125). They wanted to show the marks to a cutter to find out if they could come out without reducing the diamond below eight carats (125). A man named Seidel came in and he took the stone to Doppelt who said it was his diamond (125). Duffield was

shaken up and did nothing except put the stone in a vault (126). Duffield then received a call from the FBI (126). He surrendered the ring to the FBI on January 14, 1974, pursuant to a search warrant (126).

On cross examination Duffield admitted defendant gave as a reason for selling the ring the fact that it had appreciated considerably in value (127). Doppelt cut the diamond but he acquired the mounting (129).

Defendant used his right name (132). Duffield cashed a $200 check for the defendant and his wife on January 10, 1974 and the check had both names as well as their address on it (132). Defendant was not trying to hide anything or deal with the property as though it was stolen.

Defendant told Duffield he had a $50,000 offer for the ring in Boston (135). The FBI called Duffield on the afternoon of January 10, 1974 (135). Duffield saw the defendant again on January 11, 1974 (135) in his office (136). Defendant produced his receipt and asked for his diamond back (136). The second time the defendant asked for the ring back, two FBI men were present (136). Duffield had not been served with a search warrant yet (136). Duffield refused to return the diamond to defendant on verbal order from the Federal Attorney's office (136). Duffield held onto the ring until he was served with a search warrant (136, 137).

Doppelt told Duffield that the ring had been lost (137). He didn't say it had been stolen.

Duffield had been in the jewelry business about thirty-five years (121, 130) and he had never been offered a piece of jewelry that he had suspec-

ted to be stolen (137). He had no personal knowledge that this diamond was in fact stolen (138).

Again the Government failed to prove by Duffield that the ring was stolen or that defendant knew the ring was stolen. All indications are to the contrary. Had defendant known the ring to be stolen he wouldn't have gone to a reputable diamond merchant such as Duffield. He wouldn't have entrusted and left behind the diamond with the mounting which was inscribed to a strange but reputable merchant. He wouldn't have gone along with taking the diamond out of its setting.

Defendant made a motion prior to trial to suppress the diamond ring as evidence and the testimony of Agents Gera and Mitchell (A-12 to A-15). During the trial and just prior to Mitchell testifying, the Court denied both motions (139, 140).

The Government called as its next witness FBI Agent Mitchell. He interviewed the defendant on January 1, 1974 (141) at the Americana Hotel in the presence of defendant's wife and another agent (142). He questioned defendant in connection with his acquiring an 8.03 carat diamond ring (142). Defendant said he acquired the ring in the spring of 1972 from a former business associate named William Ruben Turner from Gainesville, Florida (142). Defendant said he was in New York to have the ring appraised and hopefully to sell it (142). Defendant told him the ring was at Bergman's Jewelers in New York City (143) where he took it for appraisal (144). He told Mitchell he had the ring appraised by an appraiser in Vermont and one in Boston (144).

Defendant said he gave Turner $15,000 case for the ring and he forgave a $5,000 indebtedness (144). He told Mitchell that Turner got the ring through some gambling venture (144). He said he withdrew the $15,000 from a bank account (145). He said he bought the ring as an engagement present for his present wife Lael (145). Defendant said he had no documents for the ring (145). He told Mitchell he brought the ring to New York from Vermont for the purpose of selling it (145).

Defendant told Mitchell that Turner was a former business associate and friend who died in October 1972 in a Florida hospital from a kidney ailment (148). He told Mitchell that Turner was a compulsive high stakes gambler and that they lived in the same building (148).

On cross examination, Mitchell admitted defendant told him that Turner was in the drycleaning business (148). Mitchell said defendant was extremely polite, cordial and cooperative during the interview on January 11, 1974, and was not evasive nor did he give conflicting statements (154, 160). Mitchell called defendant from the hotel lobby and saw him three or four minutes later for an interview lasting about forty minutes (156). Mitchell believed he advised defendant the ring was stolen as distinguished from missing (157, 158). Mitchell said he interviewed defendant because through FBI sources he learned the ring was missing or stolen from Nieman-Marcus in Dallas (159). After he told the defendant the ring was missing or stolen, Mitchell said the defendant appeared somewhat surprised (159) and was somewhat shocked or disturbed (159, 160). Mitchell saw defendant thereafter at

L. Bergman's when defendant demanded the return of his ring (161). Defendant didn't refuse to answer any questions (161).

Mitchell recalled defendant advising him that insurance was costly and restrictive as to movement in conjunction with a safe deposit box (172). After the interview on January 11, 1974, defendant told Mitchell he was going to tender the receipt for $75,000 at L. Bergman's and demand the ring back (174). Defendant told Mitchell that Koelsch was a friend and neighbor in Vermont and he was a pilot flying international routes (176).

The Government again through Mitchell did not prove that the ring was stolen nor that the defendant knew it was stolen.

The Government called as its next witness, Thomas Sander, a reporter for Today Newspaper in Gainesville, Florida (185). He talked to defendant on November 27, 1974 (186). Sander had written an article about defendant's indictment and he tried reaching the defendant (186). Sander asked defendant if he knew the ring was stolen and he said:

> "No. I still don't know it was stolen. He did not know it was stolen, referring to Mr. Turner, the man who sold him the ring. If he didn't know it was stolen, how could I?" (189).

Defendant told Sander the ring was for his wife, Lael (189, 190).

The Government didn't prove the ring was stolen or that defendant knew it was stolen through Sander's testimony.

The Government's next witness was Janet N. Ross Adams, a stenographer who took the defendant's deposition in a divorce proceeding September 21, 1972. Two depositions were offered by the Government (193-195). Defen-

dant objected, claiming neither one tends to prove the two elements at issue (195). The Court overruled the objection and said "the Government is attempting to make a showing by inference." (195). with one deposition showing defendant didn't have any available cash at the time and the other deposition showing defendant didn't know how much he paid for the ring (195). The Court acknowledged what transpires in matrimonial cases as follows:

> "Of course I know what happens in divorce proceedings is that one makes every effort to minimize what assets one has." (196).

The Government called as its final witness Stanley Doppelt (206). He is a diamond cutter (206). He sells cut diamonds (206). Neiman-Marcus is one of his customers (206). He gave a diamond ring on consignment to Nieman-Marcus (206). Ring was shipped to Nieman-Marcus (207). The diamond was never sold by Nieman-Marcus (207). The diamond was never returned (207). He next saw it when Seidel brought the diamond over to his office and he said, "That's our diamond that disappeared from Nieman-Marcus a couple of years ago" (208). He identified the stone and the mounting (209, 210). De Beers is an agent in Africa selling rough diamonds (213). He didn't have any knowledge of how the ring was lost from Nieman-Marcus (217). He was compensated for the loss of the ring (219). He first learned the ring was missing when Nieman-Marcus called and informed him that the ring disappeared (222). Government's Exhibit B refers to the missing ring in part as follows:

> "Balance due - Balance on loss in Dallas, loss" (226)

Doppelt was asked what the word "loss" meant and he replied, "they

just didn't have it, that's it" (226). Nieman-Marcus made up for the loss to Doppelt by a series of credits (226).

On cross examination, Doppelt said it was probably Nieman-Marcus who put the word "lost" on their invoice (227). Doppelt read Exhibit B as follows:

"Balance on diamond loss in Dallas last year." (229).

He said it was their, referring to Nieman-Marcus, bookkeeping department (229). Doppelt of course had no personal knowledge whether the diamond was lost or stolen (229).

Doppelt's testimony again did not prove the ring was stolen or that defendant knew it was stolen. In fact, Doppelt's testimony did show that the store concerned, Nieman-Marcus, treated the ring as being lost rather than stolen. They were the people who had it last. They were the people with the good security. They investigated the loss after the ring was discovered missing upon the taking of inventory. They didn't notify the police. There is no evidence whether the missing ring ever became the subject of an insurance claim and the results of any investigations that may have ensued therefrom. The conclusions seem to be that the ring was lost rather than stolen and defendant dealt with the ring which was so readily identifiable, including the mounting, that no inference could be drawn from his conduct and actions that he had any knowledge that the ring was stolen, if it ever was stolen.

The Government next read into the record a deposition of defendant taken May 19, 1972, during a divorce proceeding (230, Exhibit 15). De-

fendant testified at that time he had no savings accounts and just a small checking account (231). He had no safe deposit box at that time (232). He had about $3,000 in cash in Coco Beach which was part of the proceeds from a fee (232, 233).

The Government read from another deposition taken of defendant on December 21, 1972 in the same matrimonial action (234, Exhibit 16). Defendant didn't buy any diamond rings for Lael Batchellor (234). He may have told someone he did but she bought them herself (234). He doesn't have any insurance policy (235).

The Government repeatedly attempted on its direct case to show inconsistent statements allegedly made by the defendant concerning acquisition of the ring. There is no question but that defendant was in the midst of a divorce proceeding at the time and the lady he subsequently married was the recipient of the ring in question. This is not the type of evidence required to sustain a conviction.

The Government then placed in evidence the stipulation as to two elements of the crime charged, namely, that defendant, on or about January 9, 1974, transported the diamond from Vermont to New York and at the time the diamond was worth more than $5,000 (235, 236).

This completed the Government's case and it rested. (236).

Defendant moved for a judgment of acquittal on the grounds that the Government failed to make out a prima facie case (237). Defendant argued that there was no proof the ring was stolen and this was an essential ele-

ment (237). The Government's best witness on this point was Magner, the salesman from Nieman-Marcus, but he offered no evidence on this point. There was no one in a better position than he to know whether the ring was missing or stolen. To negate the possibility of a theft, he testifies that the store didn't change its security in any way after the ring turned up missing (237, 238). With the elaborate security set-up the store had, wouldn't it have made some changes had it felt that the ring was stolen? Also to negate a theft, the ring was not reported as stolen to the police or authorities (238). Had there been any evidence of theft, wouldn't the FBI agent who investigated this case have uncovered and testified to same?

Defendant also argued as to the lack of evidence to support the element of defendant having knowledge that the ring was stolen (238). The Court at this point admitted that there wasn't any direct evidence showing defendant knew the ring was stolen but said the Government was apparently relying on circumstantial evidence and he was going to allow the matter to go to the jury (239).

The Government admittedly had no facts nor presented any upon which to prove the ring was stolen and relied upon circumstantial evidence from which to draw a presumption or inference that the ring was stolen. In addition, they admittedly had no facts nor presented any upon which to prove that the defendant knew the ring was stolen and relied upon circumstantial evidence from which to draw a presumption or inference that the defendant knew the ring was stolen. Therefore, the Government attempted to prove

the second necessary element of defendant's knowledge that the ring was stolen by inference upon inference.

A presumption or inference generally must be drawn from a fact and not from a previous inference. As the Court stated in UNITED STATES v. ROSS, 92 U.S. 281, in rejecting an inference on another inference:

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissable. No inference of fact reliably is drawn from premises which are uncertain."

The only facts from which an inference could be drawn in this case are not only uncertain but those facts at least indicate that the ring was not stolen but was only missing. The defendant's conduct and actions are contrary to that of a man having knowledge that the ring was stolen.

There must be a rational connection between the facts proved and the facts therefrom inferred, and the inferences must not be so unreasonable as to be mere arbitrary mandates, otherwise there will be a violation of due process (UNITED STATES v. YEE FING, 222 Fed. 154).

On the defendant's case, the defendant took the stand in his own behalf. (242). He testified as to his family background (243) and then his own background (243, 244). He met Turner in law school (245). They became close friends and the relationship continued until Turner's death (245). Turner was a salesman (245) and had a drycleaning franchise, plus other pursuits (246) He was a successful high stakes gambler (246). Turner died in October, 1973 (246, 247).

Defendant then testified as to the facts and circumstances surrounding his acquiring the ring from Turner in May, 1972 (247, 248). Turner said he won the ring gambling (249). He knew Turner over twenty-five years (249). Turner said he was going to sell it and he wanted $20,000 (249). Defendant's wife liked the ring (249). Defendant agreed with Turner to pay him $15,000 cash and the remaining $5,000 would be paid by forgiving certain debts owed to defendant (250). The transaction was consummated and the defendant's wife gave Turner some cash and the rest was to be paid later (251). A day or two later, defendant and his wife went to Nassau and while there had a jeweler look at it just to confirm it was genuine gemstone diamond, which he did (250, 251). This was prior to the time defendant paid Turner the balance. Defendant's wife lived in Nassau for seven years (251). Defendant's wife paid Turner the balance when they returned from Nassau in June or so (251).

About three weeks after purchase, defendant had the ring appraised for insurance purposes in Philadelphia (252). It was appraised at approximately $21,000 (252). Thereafter defendant asked his insurance broker to put a binder on the ring (254). The insurance was never taken out because the annual premium was too high and too many conditions were placed on the handling of the ring (255). Defendant therefore had the ring from May, 1972 until January 1973 (255). Defendant never used an assumed name when he exhibited the ring to others (256). The diamond and mounting were never changed (256). They took the stone to stores in San Francisco and Palm Springs for

polishing and comparison purposes (256) and also stores in Atlanta, Boston and Bennington, Vermont (257).

Defendant was aware, as a lawyer, that the statute of limitation for the crime charged is five years in Florida and five years federally (262). Defendant decided to sell the ring after twenty months because it was uninsured, it had appreciated in value substantially and he feared for his wife's safety (263). Defendant went to Boston for the appraisal (263). Then an acquaintance, Arnold Koelsch, suggested a jeweler in New York named Ben Aronstein who was associated with L. Bergman, Inc. (263) a very reputable merchant of diamonds (264). Defendant knew New York to be a headquarters for major items of jewelry (264). They saw Mr. Duffield on January 10, 1974 at L. Bergman, Inc. and he gave a receipt for the ring because the ring had to be stripped and sent to the Gemological Institute (265).

There was and is no substantial evidence to rebut defendant's testimony that he innocently bought the ring from a third person, that he paid a substantial sum for the ring as evidence of a purchase in good faith, and that the appraised value does not necessarily render the purchase price non-substantial. The inferences that defendant made a serious mistake in not obtaining a bill of sale or some proof of purchase from Mr. Turner when defendant purchased the ring are wrong and prejudicial. There was no evidence to show that a bill of sale was require under Florida law for a transaction of this type. It is this alleged mistake inferred by the Government, and for no other reason, that the prosecution has built its case and weaved a web of

character assassination and innuendoes. If defendant had obtained such a bill of sale from Turner, this prosecution would never have been brought.

In UNITED STATES v. GLASSER, 443 F2 994, the Court reversed the conviction on two counts of an indictment and stated in part:

> "All that was established on these two counts was that the glass was vandalized and on one occasion a note found. We cannot see how this evidence could have led the jury to find or infer beyond a reasonable doubt that Glasser was guilty of the two acidings in question. Since the evidence was thus insufficient...his conviction on those two counts must be revised."

The motion to dismiss the indictment should have been granted because of the failure of proof that the diamond ring was in fact stolen rather than simply lost. In FARESE v. UNITED STATES, 428 F2 178, the Court reversed a conviction for transporting aforged security. The Court held that an erroneous ruling relating to the substantial rights of the parties is ground for reversal unless it affirmatively appears from the whole record that it was not substantial. The failure of proof in this case is substantial and fails as a matter of law.

The District Court should have also dismissed the indictment for the failure of proof on another element, namely, that the defendant knew the ring was stolen. The openness, candor and honesty of the defendant with respect to his dealings with the ring strongly rebut any inference that could be drawn from the evidence. In STREET v. UNITED STATES, 331 F2 151, it was held that the evidence failed to sustain a conviction for transporting forged securities. In UNITED STATES v. HAMRICK, 293 F2 468, it was

held that the evidence did not sustain the conviction for transporting a stolen vehicle in interstate commerce, or transporting stolen goods in excess of $5,000. In both cases, the evidence was more substantial against defendants than in this case, and yet the Appellate Court reversed in both cases. Not only was the conduct of the defendant the epitome of honesty and frankness, but the issue remains unresolved as to whether the ring was or was not stolen property.

The presumption of innocence has not disappeared in this case, in spite of the guilty verdict, because it is not supported by substantial evidence (BRADFORD v. UNITED STATES, 129 F2 274, cert. den. 317 U.S. 683).

POINT TWO

THE COURT BELOW ERRED IN DENYING DEFENDANT'S MOTION MADE PRIOR TO TRIAL TO DISMISS THE INDICTMENT BECAUSE THE INDICTMENT WAS FATALLY DEFECTIVE FOR FAILURE TO STATE ONE ESSENTIAL ELEMENT OF THE CRIME CHARGED, NAMELY, THAT IN FACT THE DIAMOND RING WAS STOLEN, CONVERTED OR TAKEN BY FRAUD.

Defendant moved to dismiss the indictment prior to trial under Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, on the ground that the indictment didn't state facts sufficient to constitute an offense against the United States and was fatally defective in that it failed to allege an indispensable element, namely, that the property was stolen, converted and /or taken by fraud (A 9). This motion was denied (A 2).

The Court in UNITED STATES v. BEARD, 414 F 2, 1014, in a similar case, reversed the conviction and remanded the case with direction to dismiss the indictment. In the Beard case, involving interstate transportation of falsely made and forged securities, the Court held that failure of the indictment to allege unlawful or fraudulent intent was not a "technical deficiency" which did not prejudice the defendants, but instead, it was a fatal defect rendering the conviction infirm. The Court also stated that the defect was not cured by reading the applicable statute, which is the same as in the case at hand, to the jury or by an instruction of the Court that an essential element of the crime is action with unlawful or fraudulent intent.

Although the case at hand doesn't require the element omitted in the Beard case, it does have a necessaryelement which was omitted from

the indictment, namely, that the ring was in fact stolen.

The two elements of first the ring being in fact stolen and secondly, having knowledge that the ring was stolen, are totally distinct and separate, but both are required to properly charge the defendant and both elements must be proven.

For example, in the case of LOMAN v. UNITED STATES, 243 F 2 327, the defendant was charged and convicted for feloniously transporting United States currency in interstate commerce, knowing the same to have been converted and taken by fraud. On appeal the conviction was reversed with directions to enter a judgment of acquittal on the grounds that the evidence showed that the money in question had not been stolen until after it had been transported in interstate commerce.

POINT THREE

CERTAIN REMARKS BY THE PROSECUTOR WERE PREJUDICIAL TO THE DEFENDANT, THEREBY DENYING HIM A FAIR TRIAL AS GUARANTEED BY THE CONSTITUTION.

It is basic to the American system of criminal law that an accused be tried and either convicted or acquitted upon the facts in evidence in his case. It is the primary duty of the prosecutor to see that "justice"is done and the rights of all are protected (BRADY v. MARYLAND, 373 U.S. 83; MOONEY v. HOLOHAN, 294 U.S. 103). There is a positive obligation on his part to see that a trial is fairly conducted (BERGER v. UNITED STATES, 295 U.S. 78; UNITED STATES v. WILKINS, 326 F 2 135).

In his opening statement to the jury, the prosecutor in this case commenced a series of unintentional but nevertheless prejudicial statements which at least cumulatively denied defendant a fair trial. After introducing himself as the Assistant United States Attorney who would prosecute the case for the Government, he told the jury that this was an important criminal case. He said it was important to the Government as well as the defendant (40). This so-called setting the stage and telling the jury at the inception that the case was an important one to the Government is improper.

The desire of the prosecutor to win his case may have lead him into overzealousness in another area when he remarked to the jury in his opening statement:

> "That's what we have undertaken to prove to you beyond a reasonable doubt and that is what we submit we will be able to prove to you before this trial concludes beyond any doubt, not just beyond a reasonable doubt".

The prosecutor stands before the jury with an advantage just by virtue of his position as the Assistant United States Attorney. In the jurors minds he stands there as the one upholding law and order. Certainly between the two sides, in their minds, and especially where the defendant represents himself, the jurors will be inclined to listen to more carefully, and believe more readily, the one who stands on the side of or represents law enforcement. Jurors being human, this advantage exists realistically before anything is said or done at the trial. Therefore the need for caution on the part of the prosecutor in his statements to the jury.

After telling the jury in his opening what an important case this was, the prosecutor then told them what a simple case it was (43). Why is this case important? In the jurors' mind, he will think that there is something special or extraordinary about it if the prosecutor tells him its important. He doesn't know, and he wasn't told, that all cases prosecuted by the Government are important, at least important to someone such as the defendant. True some cases are more important than others to the Government, either because of their severity or the magnitude of their implication, and if the prosecutor tells the jury the case is important, he is going to believe that this is something more than just the ordinary case, and he has the right to believe that because he is hearing it from someone certainly much more knowledgeable on the subject than he is.

What does the juror think if he is then told by the prosecutor that the case is simple. He knows now that its important and he's being told in effect that it's simple or easy. In the jurors mind he has already deduced before any evidence is offered that the Government has an important case that is

going to be easy to prove.

In summarizing for the jury in his opening what he expected the evidence would show, the prosecutor in referring to defendant's trip from Vermont to sell the ring said:

> "Then the evidence will show that through an absolutely amazing coincidence, a very queer twist of fate took place --- And by an absolute, queer, one in a million chance the evidence will show that Gordon Duffield took that diamond to Stanley Doppelt to have Stanley Doppelt give an opinion as to its value" (45).

This type of characterization and dramatization, as innocent as it may be, is severely prejudicial. By the first introduction, the "coincidence", the "queer twist of fate", the inference would be clear to the juror that the evidence that followed was something the defendant wanted to conceal or at least that it was of a detrimental nature to the defendant. The following remarks referring to tremendous odds of the ring ever finding its way back into the hands of its original owner and even more prejudicial because they emphasize and inflate the initial remarks. With this type of a build-up, it's unrealistic to expect the jury to say, or at least think, "so what, let's hear the evidence and prove to us the ring was stolen and the defendant knew it". In fact, by this time after such an interlude the jury most likely is thinking "the poor defendant took a chance and by a queer twist of fate he was caught".

In his opening statement, the prosecutor is summarizing what the defendant told the FBI during investigation, said "he told the FBI he had not seen any papers, any title papers to the ring "(46). The ring was purchased

in Florida. There was no evidence that under Florida law a bill of sale or title papers are required. Therefore the statement that defendant told the FBI he saw no title papers is without foundation and is prejudicial in that the jury would infer from the statement that such title papers were required for the transaction to be a legitimate one, and if there are no such papers then there must be something wrong.

The prosecutor later in his opening, again over dramatized the alleged inconsistent statements made by defendant as to where he got the ring, by saying:

> "The evidence will also show, however, that Mr. Clark from time to time had given other wildly inconsistent versions of where he got that ring". (47).

The inconsistent statements attributed to the defendant might be valid in attacking defendant's credibility after he testified, if he ever testified, but these remarks were made during opening statements. Certainly the inconsistent statements could hardly be considered proof on the Government's affirmative case. Therefore, considering when made, these remarks were prejudicial because they only place the defendant's credibility in issue and place him in a bad light.

The prosecutor told the jury defendant was involved in divorce proceedings in September, 1972, and that he told the FBI he got the ring in question to give to his present wife as an engagement present (47). Again the only purpose of referring to the divorce proceeding would be to adversely affect the defendant in the jurors' minds and bringing in the name of defendant's present wife would be to aggravate or intensify the prejudice already created as aforesaid.

He went to great lengths to detail three other alleged inconsistent statements by defendant regarding the ring. He said while being deposed in his matrimonial matter in September 1972, defendant said he didn't give his finance any ring, that he had virtually no bank accounts and that his finance bought the ring for herself and he didn't know how much it cost (47). These statements by the prosecutor in his opening were prejudicial to the defendant because they discredit the defendant without proving any of the essential elements remaining to be proven in this case.

To aggravate this point further, the prosecutor outlined to the jury that in the fall of 1973, defendant told Seymour Shultz, a jeweler in Vermont who appraised the ring, that he got the ring from a salesman of a big diamond company named DeBeers.(48). Then he told the jury that the evidence will show that DeBeers doesn't deal in polished stones such as here but that they sell to cutters like Doppelt (48). Thus he aggravates the point even further by attempting to show that this statement very likely was not correct. This is even more remote, has no evidentiary value and is highly prejudicial because the sole purpose is to attempt to show the defendant in a bad light.

The prosecutor outlined a fourth alleged inconsistent statement given to Tom Sanders, a newspaper reporter, in which defendant allegedly told Sanders he got the ring from Turner for $20,000.; that Turner didn't know the ring was stolen; and that he was a collector of rings and apparently he got stuck with a bad one (48). The cumulative adverse effects of these improper remarks in the Government's opening is serious and substantially prejudicial to the defendant.

In nearing the conclusion of his opening, the prosecutor gave the jury an alleged alternative without stating any options consistent with innocence, as follows:

> "It will be your job to decide whether or not Frank Clark's actions once he came into possession of this diamond were those of an innocent man duped or were they actions which betray the guilty knowledge of a man who knew he was in possession of a stolen piece of merchandise" (emphasis added) (49).

These weren't the alternatives at all that the jury had to decide. The defendant didn't have to be duped to be found innocent. There is no evidence the ring was stolen and there is no evidence that Turner knew the ring was stolen if in fact it was stolen. There was, therefore, no basis in fact for the remark.

At the conclusion of his opening, the prosecutor told the jury he was confident they wouldn't hesitate to return a guilty verdict as charged. In view of the remarks which preceded this remark, this statement is highly prejudicial because it could not be based upon evidence inasmuch as no evidence had yet been introduced, and the only basis for the statement was, therefore, the statements by the prosecutor in outlining what he expected to prove at the trial, much of which was not relevant as proof of the two elements remaining and which were otherwise improper and prejudicial because of the words used as set forth above. Defendant objected to this statement and moved to strike it but the Court denied his request (50). For the reasons aforementioned, the District Court erred because it should have granted defendant's motion and stricken the statement and at least instructed the jury to disregard it at that particular time.

Although the Government never proved title papers were required for a transaction of this type in Florida, nevertheless, the prosecutor asked Mr. Shultz whether defendant showed him any title papers (100). Not having proven a requirement for title papers, this question was improper and prejudicial.

The prosecutor asked Shultz if defendant told him where he got the ring and he said defendant told him he bought it from a DeBeers salesman six or seven years ago (99, 100). Shultz then testified DeBeers don't deal in polished stones (100), obviously with a view of attempting to discredit the defendant. Inconsistent statements as to where he got the ring do not help to prove that the ring was stolen or that defendant knew it was stolen.

The Government objected when the defendant on cross examination asked Duffield whether it's a million to one shot that it wound up with Mr. Doppelt and the Court sustained the objection (130), yet the prosecutor in his opening made a characterization of similar import as aforesaid.

The Government asked its witness, FBI Agent Mitchell whether defendant indicated to him whether he had any documents of title to the ring (145). Defendant said he didn't (145). This question is objectionable and prejudicial as aforesaid.

POINT FOUR

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE OF PLAIN ERROR AND DEFECTS AFFECTING SUBSTAN TIAL RIGHTS.

Under Rule 52 (b) of the Federal Rules of Criminal Procedure, the Court may notice plain error or defects affecting substantial rights although they were not brought to the attention of the Court. Although defendant did not except to all of the charges, he is nevertheless entitled to relief and justice under this Rule. Defendant raised in his written motions the facts that not all elements of the alleged crime were proven and prejudicial remarks by the prosecutor (A9, A19, A21). In accord with Rule 52 (b), this Court should reverse and dismiss the indictment or as an alternative, and in the interest of justice, reverse and grant a new trial. At page 268 of 2 Wright's Federal Practice and Procedure (Criminal), it is stated:

> "It is the imperative duty of a Court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding these elements. (CLYATT v. UNITED STATES, 197 U.S. 207
>
> ---The insufficiency of the evidence was said to require reversal because "a plain error has been committed in a matter so vital to the defendant."

Rule 52 (b) is particularly applicable because of the grave doubt as manifested by the jury not being able to reach a verdict after the first charge(497).

There were two subsequent instructions to the jury after the original instructions. The cumulative effect was to prejudice the jury in favor of the prosecution because of errors in the original charge. The Court refused to instruct the jury initially as per his requests following:

1. Fourth request to charge that if ring was lost, jury must acquit. Court not only failed to make such a charge but intimated that the fact that the ring was "missing" is evidence that it was stolen (489).

2. Court failed to carry out purpose of the third request to charge but rather indicated to the jury that it could 'infer' from defendant's actions that he had guilty knowledge that it was stolen (489,-490).

At this point the jury was already predisposed and disposed to infer guilt from defendant's conduct.

In the second charge to the jury the Court stated "Like all cases, it must be disposed of at some time" (501). The effect of this is undue pressure on the jury to reach a verdict (United STATES v. DUKE 429 F 2d 693; UNITED STATES v. DOMENECH, 476 F 2d 1229).

In the third charge to the jury in response to a request by the jury for further instructions on the element of 'stolen'property, the Court erroneously covered the stipulation on transporting the property (506). Thus the jury would be confused and would infer that the stipulation included the issue of whether or not the ring was stolen.

The use of the word "infer" (509) by the Court appeared to equate the actions of defendant with knowledge that the ring was stolen. The Court stated as an established fact that the ring was sold at a "substantially discounted

price" as an inference of the "illicit character" of the item sold. The fact was that defendant paid a substantial price for the ring and not a substantially discounted price. The Court uses this erroneous fact to support a so-called "illicit character" thereby prejudging the transaction of sale and prejudicing the jury from reaching their own conclusions and findings of facts.

At pages 511 through 514 of the transcript, the Court indicated that defendant had the duty to explain his possession of the ring. Defendant had no such duty and this was just a further error which prejudiced him. There was no proof the ring was stolen and there was no proof that defendant was in the possession of recently stolen goods. To reach the point that the goods were recently stolen, this could only be done by inference on an inference.

The cumulative effect of the improper comments by the Court in three separate charges cocerced the jury with a verdict. (UNITED STATES v. DIAMOND 430 F 2d 688).

It is only when the evidence of guilt is convincing that the question of plain error does not arise. In UNITED STATES v. JACKSON, 429 F2d 1368, the Court held that where defendant was not given warning of his rights, his statements should not have been admitted in evidence, but where other evidence was overwhelming, error in admitting the statements was harmless.

In UNITED STATES v. STATLER, 490 F 2d 345, the Court held that errors in the admission of evidence were not harmless where it could not be said with fair assurance that the errors did not have substantial influence on the verdict or the matter was in grave doubt.

The numerous errors committed in this case were plain errors as argued in the points heretofore herein and such errors affected the substantial rights of the defendant and but for such errors the defendant would have been acquitted.

POINT FIVE

THE MOTION BY DEFENDANT TO SUPPRESS EVIDENCE AND TESTIMONY SHOULD HAVE BEEN GRANTED.

Since the ring was seized without a search warrant, (T268) the burden of establishing probable cause is on the prosecution. (UNITED STATES v. JEFFERS, 72 S. Ct. 93). The ring was illegally seized without a warrant and there was not sufficient evidence to support the warrant which was ultimately obtained after the ring was seized. The motion to suppress should, therefore, have been granted pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure (A 12).

Moreover, the affidavit to obtain the search warrant was based upon information obtained from the defendant who was not advised of his constitutional rights when he gave this information (A 7). Therefore, this affidavit should also have been suppressed. (NARDONE v. UNITED STATES, 60 S. Ct. 266, 268).

It is not merely the material seized that can't be used in evidence but the Government may not use the information thus improperly gained as a means of finding 'proper' evidence (3 Wright-Federal Practice and Procedure-Criminal , page 133).

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, in the interest of justice, a new trial should be ordered.

Respectfully submitted.

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AFFIDAVIT OF SERVICE

Re: 75-1178
U.S.A. v. Clark, III

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant .

That on the 16th day of June , 1975, I served the within Appendix & Brief for Appellant in the matter of United States of America v. Frank Clark, III ,

upon Paul J. Curran, Esq., United States Attorney,
Southern District, U.S. Courthouse, Foley Square,
New York, New York 10007

by depositing two (2) true copies of Brief & 1 Appendix the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 16th day
of June 1975.

Lorraine Leotta
A Notary Public of the
State of New Jersey.
LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.